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HONEST DEAL SDN BHD

v.

CONVENIENCE SHOPPING SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF JC
[ORIGINATING SUMMONS NO: S6-24-551-2007]
24 MARCH 2009

C

CONTRACT: *Tenancy agreement - Duration of tenancy - Whether tenancy for fixed period of three years or a month to month tenancy - Whether option to renew in tenancy agreement gave rise to perpetually renewable tenancy - Whether option to renew void for uncertainty - Whether option to renew tenancy for a period exceeding three years turned tenancy into a lease*

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LAND LAW: *Tenancy - Duration of tenancy - Whether tenancy for fixed period of three years or a month to month tenancy - Whether option to renew in tenancy agreement gave rise to perpetually renewable tenancy - Whether option to renew void for uncertainty - Whether option to renew tenancy for a period exceeding three years turned tenancy into a lease*

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LANDLORD AND TENANT: *Tenancy - Duration of tenancy - Whether tenancy for fixed period of three years or a month to month tenancy - Whether option to renew in tenancy agreement gave rise to perpetually renewable tenancy - Whether option to renew void for uncertainty - Whether option to renew for a period exceeding three years turned tenancy into a lease*

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The defendant had signed a Tenancy Agreement dated 27 July 1988 ("the Tenancy Agreement") with Yap Kow & Sons Sdn Bhd ("the Former Owner") in respect of a premises ("the said Premises") for a period of three years, starting 1 July 1988 and ending 30 June 1991. The Tenancy Agreement contained cl. 4(c) which provided as follows: "including an option to renew such lease for the further term of three years at the expiration of the term granted". On 18 December 1992, the Former Owner sold the said premises to the plaintiff. The plaintiff's then-solicitors accepted rental moneys from the defendant without prejudice, pending the execution of a new tenancy agreement. The parties could not agree on the terms of the new tenancy agreement and this disagreement continued through until 2005. The defendant now insisted that the 1988 Tenancy Agreement bound the plaintiff. The plaintiff filed the Originating Summons herein claiming for the following relief against the defendant: (i) a declaration that the Tenancy Agreement

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was void and of no effect; and (ii) a declaration that the defendant was occupying the said Premises as a monthly tenant. The plaintiff submitted as follows: (i) that the Tenancy Agreement was for a fixed term of three years and it had ended as of July 1991; (ii) that cl. 4(c) potentially allowed the defendant to stay as tenants for as long as they wish which therefore made it a perpetual lease, which is void at law; and (iii) that what existed was merely a tenancy at will, which was being renewed month-to-month since rent was paid on a month-by-month basis.

Held (dismissing the originating summons with costs):

(1) When the Former Owner sold the said Premises to the plaintiff on 18 December 1992, the plaintiff took with him the burden of the defendant's tenancy. (para 18)

(2) Clause 4(c) gave rise to a perpetually renewable tenancy and evinced the intention of the parties to have a perpetually renewable tenancy. The terms in cl. 4(c) was clear and did not present any ambiguity. There was no uncertainty as to when the option to renew could be exercised by the defendant. Hence the plaintiff's submission that cl. 4(c) *ie*, the option to renew was void for uncertainty was totally misconceived. (para 42)

(3) Section 224(b) of the National Land Code, 1965 ("NLC") states that any option for renewal shall not be taken into account when determining the length of a tenancy for a fixed period. The term in the present tenancy was for a fixed term of three years. Even with the perpetual renewal clause, it did not turn it into a lease as envisaged under s. 221(2) of the NLC. Thus, the submission of the plaintiff that cl. 4(c) implied a perpetual lease was misleading and misconceived. (para 52)

(4) Letters of correspondences between the plaintiff and the defendant showed that, it was the intention of both parties that the tenancy was not to be month to month. At all material times the tenancy of the said Premises were renewed pursuant to cl. 4(c). The plaintiff was estopped from claiming that the plaintiff had never agreed to the renewal of the tenancy of the said Premises based on cl. 4(c) of the said Tenancy Agreement and that the defendant was occupying the said Premises as a monthly tenant. (paras 58 & 59)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Caerphilly Concrete Products Ltd v. Owen [1972] 1 All ER 248 ***(refd)***

Hirendra Lal Bannerji v. Chin Cheng Realty Pte Ltd [1982] CLJ 477; [1982] CLJ (Rep) 894 HC ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***

Lace v. Chantler [1944] KB 368 ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 CA ***(refd)***

Parkus v. Greenwood [1950] 1 Ch 644 ***(refd)***

Sevenoaks, Maidstone & Turnbridge Rly v. London, Chatham & Dover Rly [1879] 11 Ch D 625 ***(refd)***

Siew Soon Wah v. Siew Pooi Yong [1973] AC 836 ***(refd)***

Siew Soon Wah & Ors v. Yong Tong Hong [1973] 1 LNS 137 PC ***(refd)***

Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd [1993] 3 CLJ 188 HC ***(refd)***

Zakaria Hanafi v. Ibrahim Hanafiah & Ors [1999] 3 CLJ 807 CA ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 13(1)

National Land Code, ss. 221(2), 224(b)

Other source(s) referred to:

Tan Sook Yee, *Principles of Singapore Land Law*, 2nd edn, p 263

For the plaintiff - Sadacharam Raman; M/s David Lingam & Co

For the defendant - Thangaraj; M/s Thangaraj & Assocs

Reported by Amutha Suppayah

JUDGMENT

Zabariah Mohd Yusof JC:

[1] The plaintiff filed an originating summons in encl. 1 claiming for the following relief against the defendant:

(a) a declaration that the Tenancy Agreement dated 27 July 1988 (hereinafter referred to as "the said Tenancy Agreement") made between Yap Kow & Sons Sdn Bhd (hereinafter referred to as "the Former Owner") and the defendant in respect of the property at No. 144 (GF), Jalan Bukit Bintang, 55100 Kuala Lumpur (hereinafter referred to as "the said Premises") containing cl. 4 (c) therein is void and of no effect;

(b) a declaration that the defendant is occupying the said Premises as a monthly tenant and accordingly, the plaintiff is entitled to give the defendant one month notice to terminate the defendant's monthly tenancy of the said Premises and for the defendant to leave/quit the said Premises; and

(c) costs of the originating summons herein be paid by the defendant to the plaintiff.

[2] After submissions from both parties, I dismissed encl. 1 with costs. The plaintiff appeal and the following are my grounds for the decision.

[3] The following affidavits were filed for the purpose of the hearing of the said originating summons:

(a) The originating summons – encl. 1;

(b) the plaintiff's affidavit affirmed on 7 March 2007 – encl. 2;

(c) the defendant's affidavit-in-reply affirmed on 25 May 2007 – encl. 4;

(d) the plaintiff's affidavit-in-reply affirmed on 13 August 2007 – encl. 6; and

(e) the defendant's affidavit-in-reply (II) affirmed on 26 September 2007 – encl. 7.

Background Facts

[4] The defendant signed a Tenancy Agreement with Yap Kow & Sons Sdn Bhd for the premises at No 144 (GF) Jalan Bukit Bintang, Kuala Lumpur. This agreement was for three years, starting 1 July 1988 and ending 30 June 1991. The Tenancy Agreement contains cl. 4(c) which is a renewal clause, the subject of dispute in this case.

[5] On 18 December 1992, Yap Kow & Sons sold the premises to the plaintiff. By 22 July 1991, the plaintiff's then-solicitors accepted rental moneys without prejudice, and pending the execution of a new tenancy agreement, a draft of which was sent to the defendants. The defendants agreed that a new tenancy agreement should be drafted, but along the terms of the 1988 Tenancy Agreement.

[6] Draft agreements were exchanged, with plaintiff excluding cl. 4(c) and defendant demanding that the new agreement be on the same terms as the 1988 Tenancy. Defendants refused, and still disagreement over cl. 4(c) and rental moneys continued through until 2005.

[7] In 2006, plaintiffs' solicitors gave notice of renovation work and sent a draft tenancy agreement, expressing the need to execute a formal agreement. Defendants claimed that there was no such need and that the 1988 Tenancy bound the plaintiff. Plaintiff's solicitors reiterated the need for a formal agreement, and issued a demand for reply. Defendants insisted that the 1988 terms stood.

[8] Plaintiffs then took an action for originating summons essentially to seek relief that the plaintiff is not bound by the 1988 Tenancy Agreement.

Issues Before The Court

[9] The issues for the determination of the court are:

(a) whether the 1988 Tenancy Agreement continue to bind the plaintiff;

(b) whether the said Tenancy Agreement which contains cl. 4(c) therein is void and of no effect due to uncertainty in its terms; and

(c) whether the defendant is occupying the said Premises as a monthly tenant.

Whether The 1988 Tenancy Agreement Continue To Bind The Plaintiff

[10] Plaintiff's main contention is that the 1988 Tenancy was for a fixed term and it has long expired. While the purchase of the Premises may have been subjected to the 1988 Tenancy Agreement, the terms of the said Tenancy Agreement as signed with the original landlords has expired as of July 1991. The Tenancy Agreement was signed with Yap Kow & Sons in July 1988, and the exact term states:

> a tenancy ... for a term of three years commencing from the 1st day of July 1988 ... .

[11] The plaintiff alleged that on plain construction, the agreement was therefore, for a fixed term lease of three years and it has ended as of July 1991.

[12] Therefore plaintiff submits that it is no longer bound by any of the terms in the original Tenancy Agreement. Furthermore, as no new agreement was signed, stamped and formalised according to law, then there is no formal tenancy agreement exists as between plaintiffs and defendants.

[13] Plaintiff further submits that in the absence of a formal tenancy agreement, an informal agreement must exist for the defendants' contentions (that the Tenancy Agreement binds the plaintiff), to hold true. Such an informal agreement does not exist either.

[14] For an informal agreement to exist, there must be circumstances that at least give rise to the understanding that such an agreement informally exists.

[15] The plaintiff claims that both parties are still disputing over the essential terms and conditions of the agreement while attempting to arrive to a formal agreement. Terms like rent and the presence of cl. 4(c) were just two of the various conditions which neither party agreed upon.

Findings Of The Court

[16] On this the court refers to the correspondences between the plaintiff and the defendant. The plaintiff had *vide* its solicitors' letter dated 24 April 1990 (at p. 18 in exh. "QJH2" of encl. 4) clearly agreed to purchase the said Premises from the Former Owner subject to the said Tenancy Agreement in the defendant's favour and also to observe the terms and conditions contained in the said Tenancy Agreement. Paragraph 3 of the said letter states:

> Please be informed that pursuant to sale and purchase agreement our clients have purchased the property **subject to the existing tenancy** in your favour and **our clients will observe the terms and conditions contained in the tenancy agreement dated 27th July, 1988 made between you and Yap Kow & Sons Sdn Bhd** (emphasis added)

[17] The facts has some similarity with the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713 CA where there was a Sales and Purchase Agreement between the vendor and the purchaser to buy property whereby the terms provides that the vendor agrees to sell and the purchaser to buy the property in question free from all

encumbrances but subject to all conditions of title whether express or implied, all unregistered easements (if any) affecting the same and the existing category of land use affecting the said property and subject to the respective tenancy referred to in Recital E thereof. It was stated in the judgement that it was clear that the purchaser was not getting vacant possession and that the benefit and the burden of the respondents' tenancy was to be passed on to the purchaser.

[18] Similarly in our present case, when Yap Kow & Sons sold the premises to the plaintiff on 18 December 1992, from the contents of the letter from the plaintiff's solicitors dated 24 April 1990 (at p. 18 in exh. "QJH2 of encl. 4) the plaintiff took with him the burden of the defendant's tenancy.

[19] Moreover the provisions of the Tenancy Agreement clearly provides the terms of the said Tenancy Agreement binds the defendant after it purchased the property from its predecessor in title. The relevant provisions of the tenancy Agreement are as follows:

> Clause 3 (i): That in the event the Landlord shall sell or dispose of the Demised Premises or the said land during the tenancy hereby granted, such sale or disposal shall be subject to this tenancy and the landlord shall procure **that any purchaser or transferee of the Demised Premises or the said land shall duly observe and give effect to all terms and conditions in this tenancy Agreement**. (emphasis added)
>
> Clause 4(i): In this Tenancy Agreement where the context so admits:
>
> (i) the expression the landlord shall include the heirs personal representatives successors and permitted assigns of the landlord and the expression "the Tenant" shall include the successors and permitted assigns of the Tenant:
>
> Clause 4(j): This tenancy Agreement shall bind the heirs personal representatives, successors in title and permitted assigns (as the case may be) of the Landlord and the tenant.

[20] Thus, the benefit and burden of the defendant's tenancy was to be passed on to the plaintiff.

Whether The Said Tenancy Agreement Containing Cl. 4(c) Therein Is Void And Of No Effect

[21] The plaintiff's argument is that there can be no perpetual leases in law. Any lease claiming perpetuity is void at law. Defendants rely upon cl. 4(c) being construed as a lease that goes on indefinitely for as long as they choose to renew it.

[22] Plaintiff's submission that perpetual leases are void at law and is uncertain is premised on the likes of authorities as follows:

- *Sevenoaks, Maidstone & Turnbridge Rly v. London, Chatham & Dover Rly* [1879] 11 Ch D 625. This was also stated in the Malaysian case of *Zakaria Hanafi v. Ibrahim Hanafiah & Ors* [1999] 3 CLJ 807 CA, where the court held that there is no such thing as a lease in perpetuity;
- Section 221 of the National Land Code of Malaysia prohibits perpetual leases according to Zakaria;
- In the case of *Siew Soon Wah v. Siew Pooi Yong* [1973] AC 836, the court did hold that an "agreement (for a permanent tenancy) was not so vague and uncertain as to be void for uncertainty. The intention clearly was that the landlord should let the premises to the respondent for as long a period as it was within his power to do so ..." and that the intention of the parties was for a lease of "maximum period for which land can be let ..." However, the plaintiff submits that the case of *Siew Soon Wah* can be distinguished from the instant case. *Siew Soon Wah* involved a lease which lasted "for as long as the tenants wished." Here, the agreement as signed by defendant was for a fixed term lease.
- Furthermore, this proposition has not been affirmed by Malaysian authorities that followed, such as *Zakaria*'s case. Tan Sook Yee commented on the case in *Principles of Singapore Land Law,* 2nd edn at p. 263:

> It would be most unusual in a commercial environment to create a lease for life and aside from circumstances of equitable estoppel, such as those in *Siew Soon Wah*, it would be rare for the court to construe one.

[23] Such an equitable estoppel does not exist in the instant case *vis-a-vis* the plaintiff and defendants. A lease that lasts for as long as defendant wishes does not hold commercial practicality.

[24] Therefore, plaintiff submits that the case of *Siew Soon Wah* is either not applicable to the instant case or relevant in today's law on leases.

[25] Therefore the plaintiff concludes that unless the defendants so wish to not renew, the clause potentially allows for them to stay tenants for as long as they wish. This understanding makes cl. 4(c) a perpetual lease, which is void at law.

[26] Defendant's contention is that there are cases where a clause like that of cl. 4(c) of the said Tenancy Agreement was considered. The Court of Appeal in Singapore have ruled that such a clause give rise to a perpetually renewable lease and it is indeed the intention of the plaintiff and the defendant to have a perpetually renewable tenancy *vide* cl. 4(c). I will consider these cases in the later part of this judgment.

[27] As for s. 221 of the National Land Code the defendant submits that it is not relevant and likewise the cases of *Zakaria Hanafi and Sevenoaks, Maidstone, And Tunbridge Railway Company* referred to by the plaintiff, as s. 221 of the NLC and the two cases deal with leases *per se*, not tenancies or renewable lease or tenancy.

[28] Defendant further submits that the renewal under cl. 4(c) of the said Tenancy Agreement is subject to the terms and conditions stated in the agreement, and the renewal is not as of right, more so in the event there be a breach or non-performance by the defendant of any of the terms and conditions of the said Tenancy Agreement.

[29] Thus, it also follows that the issue of perpetual lease submitted by the plaintiff does not arise.

[30] Defendant alleged that the plaintiff has also failed to show in its submission as to how cl. 4(c) of the said Tenancy Agreement can be said to be uncertain and thus rendering the said Tenancy Agreement void.

[31] The defendant submits that the provision of cl. 4(c) of the said Tenancy Agreement is at all material time clear and certain.

Findings Of The Court

[32] The said Tenancy Agreement is found at exh. A1 in encl. 2. The dispute between both parties is as to cl. 4(c) of the tenancy Agreement which reads:

> If the Tenant shall be desirous of extending the tenancy hereby created for a further term of three (3) years at the expiration of the term hereby granted and shall three (3) months before the date of such expiration give to the Landlord a notice in writing of such desire and shall pay the rent hereby reserved and perform the several stipulations and covenants to be observed up the determination of the tenancy hereby created then the Landlord shall grant to the Tenant a further term of three (3) years at a revised rental based on the prevailing market rate which shall be then determined by a mutually agreed licensed valuer for premises of like nature but otherwise **subject to the same terms and conditions contained herein expressly including this covenant for renewal**. (emphasis added)

[33] The Singapore Court of Appeal case of *Hirendra Lal Bannerji v. Chin Cheng Realty Pte Ltd* [1982] CLJ 477; [1982] CLJ (Rep) 894 HC is referred, where a clause like that of cl. 4(c) of the said Tenancy Agreement was considered and the Court of Appeal of Singapore held that the lease was a perpetually renewable lease.

[34] Such ruling in HL Bannerji was quoted with approval by the Federal Court in the case of *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 where it was held:

> In *Bannerji*'s case (ante) Chua J had no difficulty in holding that the lease before him was perpetually renewable because of the words, "including the present covenant to renew", immediately following the words, "containing the like covenants and provisos as are herein contained.

[35] In the case of *Caerphilly Concrete Products Ltd v. Owen* [1972] 1 All ER 248 the English Court of Appeal held that the said lease was a perpetually renewable lease as the court was of the view that the wordings used in the agreement clearly carried the intention of the parties which expressly provided 'including an option to renew such lease for the further term of five years at the expiration thereof'.

[36] The case of *Parkus v. Greenwood* [1950] 1 Ch 644 where Evershed MR held that:

> That statement seems to me to be as clear an authority as possible that the additional of the words 'covenant', or comparable words, to the general terms 'upon like conditions and agreements as are herein contained' is, as a matter of conveyancing, to be taken as an expression of intention that the right of renewal is to be perpetual.

[37] Thus applying the principle as alluded in the cases cited to our present case and to the wordings in cl. 4(c) of the said 1988 Tenancy Agreement as reproduced in the earlier paragraphs, it expressly provides as follows:

> including an option to renew such lease for the further term of three years at the expiration of the term granted.

[38] Shows that it gives rise to a perpetually renewable tenancy and it evinces the intention of the parties to have a perpetually renewable tenancy.

[39] The next question that requires to be addressed is whether the option to renew is void for uncertainty. This is best answered by looking at some settled principles.

[40] The case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Tan Tien Chi & Anor* [1995] 2 CLJ 713 CA is referred, where one of the issues to be determined was whether there was an option to renew and whether the option was void for uncertainty, was hinged on the terms as found in the recital of the Tenancy Agreement which reads as follows:

> The premises shall be rented to the tenants for two years commencing 1 August 93 (rent free) to 31 August 1995, **plus a further two years option**. (Emphasis added)

[41] That is the only place in the whole document for that case where there is any mention of an option to renew. It was held that:

> (1) ... The recital, in the circumstances of the present case, created a right in the respondents to such an option and in the appellant, and all those who take the land subject to the tenancy, a corresponding obligation to honour that option.
>
> (2) The option was not void for uncertainty and was valid and available for exercise when the respondents did so. The respondents were businessmen looking for some security of tenure to establish a goodwill in their trade and were entitled to assume that they would be entitled to elect to extend the tenancy for another two years upon the same covenants, save the right to a further renewal. There was no difficulty in implying a term in the tenancy agreement that would give effect to the respondents' legitimate expectation. The recital being silent as to the time frame for the exercise of the option, it could be exercised by giving notice a reasonable time before the expiry of the first term. The respondents were thus entitled to a second term of two years on the same terms as those contained in the tenancy agreement except for the option of a further renewal.

[42] The terms as found in the Tenancy Agreement in the case of *Luggage Distributors (M) Sdn Bhd* did not state when the option to renew could be exercised by the respondents, yet the Court of Appeal held that it is not void for uncertainty. The terms in cl. 4(c) in our present case is clear and does not present any ambiguity. There is no uncertainty as to when the option to renew could be exercised by the defendant. Hence the plaintiff's submission that the cl. 4(c) ie, the option to renew is void for uncertainty is totally misconceived.

[43] With such clear expression of the parties' intention to have a perpetually renewable tenancy *vide* cl. 4(c) of the said Tenancy Agreement, the court is in no position to give it any other interpretation or implication. Chong Siew Fai J (as he then was) in the case of *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 3 CLJ 188 ruled that:

> ... It is not for the courts to imply covenants or stipulations which might and ought to have been expressed if intended ... It is not competent to the court to make a contract for the parties which they have not thought fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used. Generally speaking, parties to a contract are taken to have incorporated therein all terms and conditions which they wanted.

[44] Section 221 of the National Land Code 1965 which was raised by the plaintiff, is not relevant and likewise the cases of *Zakaria Hanafi v. Ibrahim Hanafiah & Ors* [1999] 3 CLJ 807 CA and *Sevenoaks, Maidstone, And Tunbridge Railway Company* [1879] 11 Ch D 625, on which the plaintiff submits that in Malaysia there is no such thing as a lease in perpetuity.

[45] A reading of s. 221 of the National Land Code 1965 and the said two cases shows that they deal with leases *per se*, not tenancies or renewable lease or renewable tenancy, as evident from the provisions of s. 221(2) of the National Land Code which reads:.

> **Every lease** granted pursuant to this section shall be for a term **exceeding three years**. (emphasis added)

[46] The tenancy between the plaintiff and the defendant is not a lease and it does not exceed three years at any one time.

[47] The case of *Zakaria Hanafi v. Ibrahim Hanafiah & Ors* [1999] 3 CLJ 807 CA where the court held that the contract for a lease is void for uncertainty as the lease is to be granted in perpetuity and the words used was "till the end of time". There is no such

thing in law as a lease in perpetuity: see *Sevenoaks, Maidstone and Tunbridge Rly Co v. London, Chatham and Dover Rly Co* [1879] 11 Ch D 625 at pp. 635-636.

[48] In *Lace v. Chantler* [1944] KB 368 it was held that an agreement to let a house for the duration of the war did not create a valid tenancy.

[49] Lord Viscount Dilhorne when delivering the judgment of the Board (Lord Wilberforce, Viscount Dilhome, Lord Pearson, Lord Kilbrandon and Lord Salmon) in the case of *Siew Soon Wah & Ors v. Yong Tong Hong* [1973] 1 LNS 137 (PC), said this at p. 134C:

> If the use of the word 'permanent' meant that the landlord was bound to let and the respondent to rent the shop in perpetuity, the agreement would be of no effect, for as Jessel MR said in *Sevenoaks, Maidstone & Tunbridge Rly Co v. London, Chatham and Dover Rly Co* (lS79) II Ch D 625 at p 635, there is no such thing in law as a lease in perpetuity.

[50] These cases cited above contain tenancy terms which are vague and ambiguous as there is no specific dateline stated for the tenancy. Clause 4(c) however provides for a specific renewal clause for a specific period ie, that the tenancy would be renewed at the option of the defendant for a further term of three years at a revised rental rate based on prevailing market price subject to the same terms and conditions provided there is no breach or non performance committed by the defendant.

[51] Further s. 224(b) of the NLC should also be taken note of, which provides that:

> In determining for the purposes of this Chapter whether any term for which land is granted exceeds any specified number of years - if the term is for a fixed period, no account shall be taken of the fact that it is capable of renewal in pursuance of an option, ...

[52] This section states that any option for renewal shall not be taken into account when determining the length of a tenancy for a fixed period. The term in our present tenancy is for a fixed term of three years. Even with the perpetual renewal clause, it does not turn it into a lease as envisaged under s. 221(2) of the National Land Code 1965.

[53] Thus, the submission of the plaintiff that cl. 4(c) implies a perpetual lease is misleading and misconceived.

Whether The Defendant Is Occupying The Said Premises As A Monthly Tenant

[54] Plaintiff submits that neither a formal nor an informal agreement on the essential terms and conditions was ever reached, as parties are still disputing over the essential terms of the new Tenancy Agreement.

[55] Plaintiff submits that what exists here is merely a tenancy at will, which was being renewed month-to-month or year-to-year.

[56] From the correspondences between the plaintiff and the defendant, it shows that the rent arrangement was paid on a month-by-month basis, thereby indicating that the lease was month-to-month.

[57] Further the plaintiff states that it has never renewed the Tenancy Agreement of 1988 as stated in the first contention of these submissions. The Agreement expired in 1991, and any subsequent renewals were not done according to the terms of that Agreement.

Findings Of The Court

[58] Letters of correspondences between the plaintiff and the defendant shows that, it is the intention of both parties that the Tenancy is not to be month to month. At all material times the tenancy of the said Premises were renewed pursuant to cl. 4(c) of the said Tenancy Agreement and this is evident from the following correspondences:

- letter from the plaintiff to the defendant dated 8 April 1991 (at p. 22 in exh. "QJH2" of encl. 4) where the plaintiff specifically referred to cl. 4(c) of the said Tenancy Agreement for the renewal of the tenancy for the period from 1 July 1991 to 30 June 1994;

- letter from the plaintiff to the defendant dated 4 June 1991 (at p. 24 in exh. "QJH2" of encl. 4) where the plaintiff again specifically referred to cl. 4(c) of said Tenancy Agreement for the renewal of the tenancy for the period from 1 July 1991 to 30 June 1994;

- letter from the defendant to the plaintiff dated 11th March 1994 (at p. 40 in exh. "QJH2" of encl. 4) where the defendant specifically referred to cl. 4(c) of the said Tenancy Agreement for the renewal of the tenancy for the period from 1 July 1994 to 30 June 1997;

A – letter from the plaintiff to the defendant dated 31 March 1994 (at p. 42 in exh. "QJH2" of encl. 4) in reply to the defendant's letter dated 11 March 1994 whereby the plaintiff agreed to the renewal of the tenancy of the said Premises for the period from 1 July 1994 to 30 June 1997 based on cl. 4(c) of the said Tenancy Agreement;

B

– letter from the defendant to the plaintiff dated 20 March 1997 (at p. 57 in exh. "QJH2" of encl. 4) where the defendant specifically referred to cl. 4(c) of the said Tenancy Agreement for the renewal of the tenancy for the period from 1 July 1991 to 30 June 2000;

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– letter from the plaintiff to the defendant dated 31 March 1997 (at p. 58 in exh. "QJH2" of encl. 4) in reply to the defendant's letter dated 20 March 1997 whereby the plaintiff agreed to the renewal of the tenancy of the said Premises for the period from 1 July 1997 to 30 June 2000 based on cl. 4(c) of the said Tenancy Agreement;

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– letter from the defendant to the plaintiff dated 29 February 2000 (at p. 84 in exh. "QJH2" of encl. 4) where the defendant exercised its option to renew the tenancy of the said Premises for the period from 1 July 2000 to 30 June 2003 based on cl. 4(c) of the said Tenancy Agreement but mistakenly stated as cl. 6;

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F – letter from the plaintiff to the defendant dated 4 May 2000 (at p. 85 in exh. "QJH2" of encl. 4) in reply to the defendant's letter: dated 29 February 2000 whereby the plaintiff agreed to the renewal of the tenancy of the said Premises under the said Tenancy Agreement for the period from 1 July 2000 to 30 June 2003;

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– letter from the defendant to the plaintiff dated 28 February 2003 (at p. 95 in exh. "QJH2" of encl. 4) where the defendant exercised its option to renew the tenancy of the said Premises for the period from 1 July 2003 to 30 June 2006;

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– letter from the plaintiff to the defendant dated 11 March 2003 (at p. 96 in exh. 1 "QJH2" of encl. 4) in reply to the defendant's letter dated 28 February 2003 whereby the plaintiff agreed to the renewal of the tenancy of the said Premises for the period from 1 July 2003 to 30 June 2006;

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– letter from the defendant to the plaintiff dated 17 June 2003 (at p. 97 in exh. "QJH2" of encl. 4) where the defendant confirmed with the plaintiff the terms and conditions of the

said Tenancy Agreement which shall be binding upon both parties in respect of the tenancy for the period from 1 July 2003 to 30 June 2006;

– letter from the defendant to the plaintiff dated 16 February 2006 (at p. 99 in exh. "QJH2" of encl. 4) where the defendant exercised its option to renew the tenancy of the said Premises for the period from 1 July 2006 to 30 June 2009;

– letter from the plaintiff to the defendant letter from the plaintiff to the defendant dated 23 June 2006 (at p. 100 in exh. "QJH2" of encl. 4) whereby the plaintiff confirmed the renewal of the tenancy of the said Premises for the period from 1 July 2006 to 30 June 2009; and

– letter from the defendant to the plaintiff dated 23 June 2006 (at p. 101 in exh. "QJH2" of encl. 4) where the defendant confirmed with the plaintiff the terms and conditions of the said Tenancy Agreement which shall be binding upon both parties in respect of the tenancy for the period from 1 July 2006 to 30 June 2009.

[59] The plaintiff therefore is now estopped from claiming that the plaintiff has never agreed to the renewal of the tenancy of the said Premises based on cl. 4(c) of the said Tenancy Agreement and that the defendant is occupying the said Premises as a monthly tenant. Refer to the case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 FC on the principle of estoppel.

[60] Plaintiff further invoked s. 6(1)(a) of the Limitation Act which provides as follows:

> the following actions shall not be brought after the expiration of six years from the date on which the cause of action is accrued, that is to say ... actions founded on contract. ...

[61] Any action defendant attempts to take now is past the six-year limit as stated. Therefore, this action is time-barred. Plaintiff claims that estoppel does not operate to prevent plaintiff from claiming so.

[62] Furthermore, s. 13(1) of the Limitation Act, states:

> A tenancy at will shall, for the purposes of this Act, be deemed to be determined at the expiration of a period of one year from the commencement thereof, unless it has previously been determined, and

A accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of such determination.

[63] This gives plaintiff the right of action against defendant with regard to the tenancy-at-will. Therefore, the plaintiff is not estopped B from raising s. 6, and has a right of action as per s. 13(1).

[64] On this issue of whether the defendant is barred by the Limitation Act, this issue does not arise because it is the plaintiff's cause of action against the defendant and not defendant instituting C an action against the plaintiff. If there is to be a limitation period, it should be against the plaintiff.

Conclusion

[65] From the abovementioned, the Tenancy Agreement dated D 27 July 1988 made between Yap Kow & Sons Sdn Bhd and the defendant in respect of the property at No. 144 (GF), Jalan Bukit Bintang, 55100 Kuala Lumpur containing cl. 4(c) therein is valid and continue to bind the plaintiff. Further to that, the defendant is occupying the said Premises not as a monthly tenant.

E **[66]** Therefore the Originating Summons in encl. 1 is hereby dismissed with costs.

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